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6 UNITED STATES DISTRICT COURT

7 EASTERN DISTRICT OF CALIFORNIA

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9 ANDRE BAIZA,

CV F 02-6552 OWW SMS HC

10 Petitioner,

ORDER DIRECTING RESPONDENT TO  
SUBMIT RESPONSIVE PLEADING

11 v.

ORDER SETTING BRIEFING SCHEDULE

12 GEORGE GALAZA,

13 Respondents.  
14 \_\_\_\_\_/

15 Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus  
16 pursuant to 28 U.S.C. § 2254.

17 Pursuant to the Court's July 31, 2003, order, this action was stayed pending exhaustion of  
18 Grounds 2(b)-(f), 3, 4 and 6. Petitioner has filed status reports on November 10, 2003,  
19 December 1, 2003, January 12, 2004, February 23, 2004, May 14, 2004, and June 18, 2004. On  
20 March 2, 2005, Petitioner submitted a notice to this Court that the California Supreme Court  
21 denied the petition and on June 14, 2005, Petitioner submit an amended petition of which this  
22 action now proceeds.

23 The Court has conducted a preliminary review of the Amended Petition. Accordingly,  
24 pursuant to Rule 4 of the Rules Governing Section 2254 Cases and Rule 16 of the Federal Rules  
25 of Civil Procedure,<sup>1</sup> the Court HEREBY ORDERS:  
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27 <sup>1</sup>The Federal Rules of Civil Procedure are "applicable to habeas corpus proceedings to the extent that the  
28 practice in such proceedings are not set forth in the statutes of the United States and has heretofore conformed to the  
practice of civil actions." Fed.R.Civ.P. 81(a)(2). Rule 11 also provides "the Federal Rules of Civil Procedure, to the

1. Respondent SHALL SUBMIT a RESPONSIVE pleading by filing one of the following:

A. AN ANSWER addressing the merits of the Petition and due within **NINETY (90)** days of the *date of service* of this order. Rule 4, Rules Governing Section 2254 Cases; Cluchette v. Rushen, 770 F.2d 1469, 1473-1474 (9<sup>th</sup> Cir. 1985) (court has discretion to fix time for filing an Answer.).

- Respondent SHALL INCLUDE with the Answer any and all transcripts or other documents necessary for the resolution of the issues presented in the Petition. Rule 5 of the Rules Governing Section 2254 Cases.
- Any argument by Respondent that Petitioner has *procedurally defaulted* a claim(s) SHALL BE MADE in an ANSWER that also addresses the merits of the claims asserted. This is to enable the Court to determine whether Petitioner meets an exception to procedural default. See, Paradis v. Arave, 130 F.3d 385, 396 (9<sup>th</sup> Cir. 1997) (Procedurally defaulted claims may be reviewed on the merits to serve the ends of justice); Jones v. Delo, 56 F.3d 878 (8<sup>th</sup> Cir. 1995) (the answer to the question that it is more likely than not that no reasonable juror fairly considering all the evidence, including the new evidence, would have found Petitioner guilty beyond a reasonable doubt necessarily requires a review of the merits).
- Petitioner's TRAVERSE, if any, is due **THIRTY (30)** days from the date Respondent's Answer is filed with the Court.

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extent that they are not inconsistent with these rules, may be applied, when appropriate, to the petitions filed under these rules." Rule 11, Rules Governing Section 2254 Cases.

B. A MOTION TO DISMISS due within **SIXTY(60)** days of the *date of service* of this order based on the following grounds:<sup>2</sup>

- i. EXHAUSTION - 28 U.S.C. § 2254(b)(1). A Motion to Dismiss for Petitioner's failure to exhaust state court remedies SHALL INCLUDE copies of all the Petitioner's state court filings and dispositive rulings relevant to the examination of the statute limitations issue as required by Ford v. Hubbard, 330 F.3d 1086 (9<sup>th</sup> Cir. 2003) and Kelly v. Small, 315 F.3d 1063 (9<sup>th</sup> Cir. 2003);
- ii. STATUTE OF LIMITATIONS - 28 U.S.C. § 2244(d)(1). A Motion to Dismiss the Petition as filed beyond the one year limitations period SHALL INCLUDE copies of all Petitioner's state court filings and dispositive rulings.
- iii. SECOND OR SUCCESSIVE Petitions - 28 U.S.C. § 2244(b). A Motion to Dismiss the Petition on the basis of § 2244(b) SHALL include a copy of the previously filed federal Petition and disposition thereof.

2. OPPOSITIONS to Motions to Dismiss SHALL be served and filed within EIGHTEEN (18) days, plus three days for mailing. All other Oppositions SHALL be served and filed within EIGHT (8) days, plus three days for mailing. REPLIES to Oppositions to Motions to Dismiss SHALL be served and filed within eight (8) days, plus three days for mailing. Replies to Oppositions to all other Motions SHALL be served and filed within eight (8) days, plus three days for mailing. If no opposition is filed, all motions are deemed submitted at the expiration of the

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<sup>2</sup>Rule 4 of the Rules Governing Section 2254 Cases provides that upon the court's determination that summary dismissal is inappropriate, the "judge shall order the respondent to file an answer or *other pleading . . . or to take such other action as the judge deems appropriate.*" Rule 4, Rules Governing Section 2254 Cases (emphasis added); see, also, Advisory Committee Notes to Rule 4 and 5 of Rules Governing Section 2254 Cases (stating that a dismissal may obviate the need for filing an answer on the substantive merits of the petition and that the Attorney General may file a Motion to Dismiss for failure to exhaust.); also, White v. Lewis, 874 F.2d 599, 60203 (9<sup>th</sup> Cir.1989) (providing that Motions to Dismiss pursuant to Rule 4 are proper in a federal habeas proceeding.)

1 opposition period.<sup>3</sup>

2 All motions shall be submitted on the record and briefs filed without oral argument unless  
3 otherwise ordered by the Court. Local Rule 78-230(h). All provisions of Local Rule 11-110 are  
4 applicable to this order.

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6 IT IS SO ORDERED.

7 **Dated: June 16, 2005**

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**/s/ Sandra M. Snyder**

UNITED STATES MAGISTRATE JUDGE

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<sup>3</sup>If, however, the Petition was filed on January 3, 2005, or thereafter, the Clerk of the Court need not serve a copy of the Petition on the Attorney General or his representative. A scanned copy of the Petition is available in the Court's electronic case filing system ("CM/ECF").